Supreme Court, U.S.
FILED
NOV. 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-521

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN DISALVO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

9pp

TABLE OF AUTHORITIES

Page

Cases:

United States v. *Ammar*, 714 F.2d 238, cert. denied, 464 U.S. 936 4-5

United States v. *Gibbs*, 739 F.2d 838, cert. denied, 469 U.S. 1106 5

United States v. *Inadi*, 748 F.2d 812, rev'd, No. 84-1580 (Mar. 10, 1986) 3, 5

United States v. *Lovasco*, 431 U.S. 783 5

United States v. *Pecora*, 798 F.2d 614 5

Constitution, statutes and rule:

U.S. Const. Amend. VI (Confrontation Clause) 4

21 U.S.C. 843(b) 1

21 U.S.C. 846 1

28 U.S.C. 2255 ..... 1-2, 3

Fed. R. Evid. 801(d)(2)(E) 5

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-521

JOHN DISALVO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that co-conspirator statements were improperly admitted under the Confrontation Clause because the government made no showing that they bore adequate "indicia of reliability" (Pet. 4).

1. After a bench trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of conspiring to distribute methamphetamine, in violation of 21 U.S.C. 846, and three counts of using a telephone in furtherance of a drug offense, in violation of 21 U.S.C. 843(b). He was sentenced to 11 years' imprisonment, to be followed by a four-year term of probation. The court of appeals affirmed without opinion (738 F.2d 425 (1984) (Table)), and this Court denied the petition for a writ of certiorari (469 U.S. 1038 (1984)). Thereafter, petitioner moved to vacate his sentence under 28 U.S.C.

2255. The district court denied the motion (Pet. App. A3-A6) and the court of appeals affirmed by judgment order (Pet. App. A1-A2).

The evidence against petitioner, which consisted primarily of intercepted telephone conversations between petitioner and co-defendant Joseph Maleno in late June 1982, was summarized by the district court when it rendered its verdict (see C.A. App. A6-A17). It showed that, at one point during a telephone conversation on June 29, Maleno told petitioner, "You were right, it's extremely wet" (*id.* at A10). Later in the conversation, petitioner told Maleno that two other "guys" were coming into town the next day, and Maleno stated that he would call petitioner again that evening or the following day (*id.* at A8).

In a conversation on the morning of June 30, petitioner said to Maleno: "There's two other guys coming in * * * this afternoon, and I want, I want you to meet them guys." The two agreed that when the "two guys" arrived, petitioner would bring them to meet Maleno at about 2:30 p.m. C.A. App. A8-A9.

As the district court found, the evidence at trial showed that the term "two guys" was a code phrase for two pieces of methamphetamine and that the term "wetness" referred to the damp condition of a shipment of methamphetamine. C.A. App. A7, A9, A10-A12, A14, A16. An expert witness testified about the meaning of the terms, and contemporaneous conversations among other conspirators supported that testimony. For example, in a conversation between Maleno and co-conspirator Anthony Orlando that occurred shortly after the first recorded conversation between Maleno and petitioner, Orlando asked Maleno, "How's that look, all right?" Maleno responded, "It's a little wet but look at the weather. It looks good to me." Then Orlando asked, "Anybody try it?" Maleno answered, "No. We

passed that stage." He added, "I think from a block away I could tell it." Orlando then asked, "It'll dry out though?" Maleno responded, "Yeah, I think it'll be all right. I think it's the weather today more than anything. Especially where they're coming from, you know. There was a driving storm and God knows what." *Id.* at A11-A12.

Likewise, in a subsequent conversation between Maleno and his nephew John, John told his uncle that "I just picked that thing up over there earlier. It's, ah, you know, a little wet. I got it opened over here. I got it under my air conditioner." Later in the conversation, Maleno stated, "I wonder if heat would help it more." Maleno added, "See, heat ain't the worst enemy, it's the wetness that hurts it. In other words, it was damp to start with and it was because of that, I think they travelled through that rain. First of all, I don't think it dried out enough." C.A. App. A14. Finally, in another conversation between Maleno and his nephew occurring five hours after petitioner's second conversation with Maleno (*id.* at A15), Maleno recounted for his nephew his conversation with DiSalvo (*id.* at A16):

> "He said, well, the opportunity's here now. I got the guy. I said 'Well, I don't want no pressures.' He said you ain't got no pressures. But, ah, he was looking for that first one today."

2. In his Section 2255 motion, petitioner argued that the telephone conversations in which he did not participate were improperly admitted under the Confrontation Clause because the government neither called the participants nor established that they were unavailable to testify. In so arguing, he relied on the Third Circuit's decision in *United States* v. *Inadi*, 748 F.2d 812 (1984), which was later reversed by this Court. No. 84-1580 (Mar. 10, 1986). The district court denied the motion (Pet. App. A3-A6) on the ground that the Third Circuit's decision in *Inadi*—which at

the time had not yet been reversed—did not apply because the out-of-court declarations in issue had not been admitted for the truth of the matters asserted (Pet. App. A4). The court referred (*id.* at A5) to its earlier oral opinion finding petitioner guilty, in which it had explained (C.A. App. A17):

> The evidentiary use I have made of the conversations in which the charged person was not a participant was a use which did not involve relying on the recitals in those other conversations for the truth of what was recited, and thus the hearsay objection which otherwise would be proper is in my judgment obviate[d]; that is to say, those conversations to which persons other than the defendant who was charged by the Government to be a conspirator, were looked to not for the truth of what was asserted to locate the defendant in the conspiracy, but to place in context and give clarification to the meaning to be assigned to otherwise ambiguous conversations that the charged defendant, in this instance Mr. DiSalvo was clearly a participant in.

On appeal, petitioner's only argument was that, contrary to the district court's determination, the statements had been used for a hearsay purpose, and that their use for such a purpose without a demonstration of witness unavailability violated the Confrontation Clause. The court of appeals affirmed the district court's decision in light of this Court's decision in *Inadi* that unavailability need not be shown (Pet. App. A1-A2).

3. Petitioner now claims that the admission of taped conversations among the co-conspirators violated his Sixth Amendment right of confrontation because the court of appeals failed to apply the "reliability test" to those statements, as was required by its own decision in *United States*

v. *Ammar*, 714 F.2d 238, 255 (3d Cir.), cert. denied, 464 U.S. 936 (1983). The court of appeals, however, had no occasion to inquire into the reliability of the recorded statements, because petitioner did not raise that issue on appeal.

The Third Circuit has held, and recently reaffirmed, that co-conspirator statements admissible under Fed. R. Evid. 801(d)(2)(E) do not automatically satisfy the Confrontation Clause, but must also be assessed for "indicia of reliability" (*Ammar*, 714 F.2d at 255-256; *United States* v. *Pecora*, 798 F.2d 614, 627-629 (1986)). That is the very rule for which petitioner contends. Had he asked the Third Circuit to determine whether there were such indicia of reliability in this case, it would have been required by its own precedent to do so (if it agreed with petitioner that the statements were admitted for a hearsay purpose). Having made no such request, he cannot complain of the court's failure to address the issue. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *United States* v. *Gibbs*, 739 F.2d 838, 846-848 (3d Cir. 1984) (en banc), cert. denied, 469 U.S. 1106 (1985).

In any event, the district court as factfinder expressly stated that it did not consider Maleno's conversations for the truth of any matters asserted; rather it considered them for the purpose of confirming the expert witness's interpretation of the meaning of certain words and phrases used by petitioner in his own conversations with Maleno. Thus, the conversations were not hearsay and did not implicate the Confrontation Clause at all. See *Inadi*, slip op. 11 n.11.

Finally, even if the Confrontation Clause was implicated, the statements at issue had sufficient "indicia of reliability." The conversations between petitioner's co-conspirators related to contemporaneous events about which the speakers had first-hand knowledge. There was therefore no risk that the statements might be unreliable because of inaccuracies in the speakers' recollection of past events. Moreover,

the speakers, who were co-conspirators in a drug scheme, had no apparent motive to lie to one another. Finally, the statements of Maleno and the other co-conspirators with whom he conversed were substantially corroborated by petitioner's own conversations with Maleno.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

---

*It is unnecessary to hold this case for the decision in *Bourjaily* v. *United States*, cert. granted, No. 85-6725 (Oct. 14, 1986), both because the issue raised in this Court was not presented below and because the co-conspirator statements at issue were not used for any hearsay purpose.

DOJ-1986-11